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May 22, 1995

FEDERAL COMMUNICATIONS COMMISSION
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Via Hand Delivery

William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554
Stop Code 1170

DOCKET FILE COPY ORIGINAL

Re: PP Docket No. 93-253
ET Docket No. 92-100
Opposition to Requests for Stay

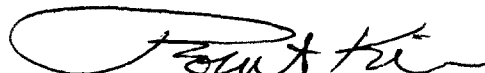
Dear Mr. Caton:

BellSouth Personal Communications, Inc. ("BellSouth"), by its attorneys, hereby submits three microfiche copies to be associated with its Opposition to Requests for Stay filed May 19, 1995, which opposed the requests for stay filed by Communications One, Inc. and GO Communications Corporation ("Jointly") and the National Association of Black Owned Broadcasters. Please associate the enclosed microfiche with the aforementioned filing.

Should you have any questions regarding this matter, please contact the undersigned.

Sincerely,

WILKINSON, BARKER, KNAUER & QUINN



By: Robert G. Kirk

Enclosure

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Implementation of Section 309(j))	
of the Communications Act --)	PP Docket No. 93-253
Competitive Bidding)	ET Docket No. 92-100
)	
Requests for Stay and Deferral)	
of MTA Commercial Broadband)	
PCS Licensing)	

OPPOSITION TO REQUESTS FOR STAY

BellSouth Personal Communications, Inc. ("BellSouth") hereby opposes the requests for stay of Broadband PCS licensing on the A and B Blocks which were filed by Communications One, Inc. and GO Communications Corporation ("Joint Motion") and the National Association of Black Owned Broadcasters ("NABOB Motion").¹

I. STATEMENT OF INTEREST

BellSouth participated in the Block A and B auctions and was successful in winning Block B licenses for the Charlotte-Greensboro-Greenville-Raleigh MTA (Market No. 6) and the Knoxville MTA (Market No. 44). BellSouth timely submitted its down payment and Form 600 applications for these markets. On April 12, 1995, BellSouth's applications appeared on public notice. See FCC Public Notice, Report No. CW-95-02 (Apr. 12, 1995).

¹ NABOB filed two requests for stay: one with a petition for review and one with a petition to deny. By this filing, BellSouth opposes both requests.

II. THE REQUIREMENTS FOR A STAY HAVE NOT BEEN SATISFIED

Petitioners' stay requests fail to satisfy the four pronged test annunciated in *Virginia Petroleum Jobbers Ass'n v. FCC*.² Under this test, Petitioners must show that (1) they are likely to prevail on the merits; (2) they will suffer irreparable harm if the stay is not granted; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest favors grant of the stay.

A. Petitioners Are Unlikely To Prevail On The Merits

Petitioners claim that they are likely to prevail on the merits because licensing the A and B Blocks prior to conducting auctions for the C Blocks would violate Section 309(j) of the Communications Act.³ Petitioners misconstrue Section 309(j).

Section 309(j) requires the Commission, in designing auction methodologies, to consider the following objectives:

- the development and rapid deployment of new technologies, products, and services for the benefit of the public without administrative and judicial delays;
- promoting economic opportunity and competition by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;
- recovery of value for the spectrum; and
- the efficient and intensive use of the electromagnetic spectrum.

² 259 F.2d 921 (D.C. Cir. 1958); *see also Washington Metropolitan Area transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977).

³ NABOB Motion at 16; Joint Motion at 7-10, 14.

Congress gave the FCC the flexibility to adopt rules that balanced all of these objectives and the FCC gave due weight to these objectives in adopting its PCS auction rules. Petitioners would upset this balanced result by elevating one of the Congressional objectives above all the others. This is clearly contrary to the objective of the legislation.

The balance struck was that the Commission achieved the goal of rapid deployment with the A and B Blocks while achieving the goal of diversity by establishing open eligibility for the A and B Blocks -- designated entities were free to bid on A and B Block licenses -- and by setting aside the C and F blocks for licensing only to small businesses and businesses owned by women and minorities (designated entities). In denying a previous request to defer broadband PCS licensing, the Bureau stated that "the Commission's decision to proceed with the first phase of PCS licensing before subsequent auctions were conducted or scheduled demonstrates that it considered prompt licensing of PCS to be *paramount* even though the timing of future auctions remained unknown."⁴ Grant of Petitioners' stay requests would frustrate this objective.

B. Petitioners Will Not Suffer Irreparable Harm

Petitioners claim that they will suffer irreparable harm if a stay is not granted because the A and B Block licenses will receive a headstart advantage.⁵ The petitioners submit no economic analysis, however, to support their claims. Further, the Commission has previously rejected the argument that PCS auctions be held simultaneously to prevent A and B Block licensees from

⁴ *Order*, DA 95-806, at 3 (released Apr. 12, 1995) (emphasis added).

⁵ NABOB Motion at 10-11, 18-19; Joint Motion at 12-14.

receiving a headstart advantage.⁶ As with cellular, the Commission has determined that the competitive disadvantage of a temporary headstart is necessary to accomplish rapid deployment.

C. Interested Parties Will Be Harmed By Grant Of A Stay

If a stay is granted, A and B Block auction winners and their potential customers will clearly be harmed. These entities have submitted substantial deposits to the FCC for PCS licenses and these deposits earn no interest while the applications remain pending. The delay associated with a stay will thus impose a direct economic penalty on these companies. Moreover, the A and B Block winners have entered into financial arrangements and are taking other necessary steps to prepare for the prompt and efficient build-out of PCS systems once licenses are awarded. Thus, a stay also would impose very substantial indirect costs on these companies (in addition to the indirect costs resulting from the forgone interest on deposits) by postponing the ability to earn revenue from these activities.

D. Grant of A Stay Would Disserve The Public Interest

Fundamentally, a stay would disserve the public interest because it would deny the public the prompt availability of new services that the A and B Block winners are preparing to offer. Moreover, the Commission has indicated that it sought to optimize and balance four factors in establishing PCS: universality; *speed of deployment*; diversity of services; and competitive

⁶ See *Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, PP Docket No. 93-253, *Fourth Memorandum Opinion and Order*, 9 FCC Rcd. 6858, 6863-64 (1994). Further, a headstart does not result in irreparable harm. McCaw, for example, became the largest cellular provider despite a headstart by wireline telephone companies.

delivery.⁷ Further, the Bureau indicated prompt licensing of PCS was of paramount concern to the Commission. Issuance of a stay will delay PCS licensing and deployment and, thus, would disserve the public interest.

CONCLUSION

Petitioners have failed to establish that (1) they are likely to prevail on the merits, (2) they will suffer irreparable harm without a stay, (3) interested parties will not be harmed by grant of their stay request, and (4) grant of the stay will serve the public interest. Accordingly, both the Joint Motion and NABOB Motion should be denied.

Respectfully submitted,

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May 19, 1995

⁷ See *Amendment of the Commission's Rules to Establish New Personal Communications Services*, GEN Docket No. 90-314, *Second Report and Order*, 8 FCC Rcd. 7700, 7702 (1993).

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